IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INTERWAVE TECHNOLOGY INC., *et al*	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
ROCKWELL AUTOMATION, INC. and RICHARD RYAN,	:	
Defendants.	:	NO. 05-398

MEMORANDUM AND ORDER

Gene E.K. Pratter, J. December 30, 2005

Defendants Rockwell Automation, Inc. ("Rockwell") and Richard Ryan ("Ryan") move to dismiss the claims of Plaintiffs Interwave Technology Inc. ("Interwave") and Jonathan Kall as the assignee of Interwave ("Kall") in this commercial dispute. Rockwell and Ryan argue that the Complaint should be dismissed because (1) the Amended Complaint does not properly allege breaches of either express or implied contract obligations, (2) the "gist of the action" doctrine prohibits Plaintiffs' fraud claims, (3) the operation of the integration clause in the operative contract in conjunction with the parol evidence rule prohibit the fraud claims, (4) this Court has no subject matter jurisdiction, and (5) Interwave lacks standing to pursue the asserted claims.

Interwave and Kall respond by positing that (1) they plead several specific instances of both implied and express breaches of contract, (2) liberal pleading rules allow alternate pleading and the "gist of the action" doctrine does not require dismissal of the fraudulent inducement claims at this stage, (3) the reach of the parol evidence rule in connection with the integration clause is not so broad as to preclude the fraud allegations here, (4) the Court has already determined that subject matter jurisdiction exists and the contract itself establishes jurisdiction for this Court, and, finally, (5) even though Interwave assigned its rights under the relevant

contract, not all of the claims in this action arise under that contract, and Interwave has preserved its independent standing to pursue certain unassigned claims.

For the reasons discussed below, the Court denies in part and grants in part Rockwell and Ryan's Motion to Dismiss. While many of the arguments presented during the oral argument on the Motion likely are precursors for hotly contested factual disputes that will no doubt prompt good faith discovery disagreements and possibly other motions in this case, at this point in the litigation, the simple fact of the matter is that the Complaint, on its face, sufficiently states a claim to place Rockwell and Ryan on notice of claims for express and implied contract breaches. The Complaint also successfully establishes the subject matter jurisdiction of this Court. However, because the claims of fraudulent inducement against Rockwell are precluded by the operation of the parol evidence rule under Pennsylvania law, Count II will be dismissed. Finally, because Interwave would have standing to the degree that there are claims outside of the assigned contract in dispute, Interwave remains a party in this case because Count III asserts fraudulent inducement claims against Ryan who was not a party to the assigned contract.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The following recitation of the facts is based on the allegations found in the Complaint and will be viewed with all reasonable inferences in the Plaintiffs' favor. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

Interwave, a manufacturing execution systems integrator located in Exton, Pennsylvania, adopted a Plan of Liquidation, and in the process of winding up its business, assigned to Kall its assets, including the rights of Interwave under a January 29, 2003, Asset Purchase Agreement ("APA") with Rockwell. Am. Compl. ¶¶ 1-3.

Rockwell is a Delaware corporation, and Ryan was President of Rockwell Software Inc., a business unit of Rockwell, id. ¶¶ 3-4, who also was Rockwell's chief negotiator and conduit of information between Rockwell and Interwave regarding the transaction between the parties that is the focal point of the litigation. Id. ¶¶ 12-14.

A. Procedural History

Interwave and Kall filed their original Complaint in this action on January 28, 2005. Very shortly thereafter they filed a Motion to Stay Proceedings Pending Non-Binding Mediation Process. In response, Rockwell and Ryan filed a Motion to Dismiss the Complaint and Opposition to Plaintiffs' Motion to Stay. On March 2, 2005, the Court granted the Motion to Stay, and denied the Motion to Dismiss, without prejudice, and ordered the parties to provide a jointly written status report by May 3, 2005 or within one week of the conclusion or abandonment of the mediation process, whichever occurred sooner.

The mediation took place in Pittsburgh, Pennsylvania on May 23, 2005, and immediately thereafter counsel for both parties advised the Court that the case remained unresolved and requested that the Court lift the stay. With the stay lifted Rockwell and Ryan then filed a Motion to Stay Proceedings Pending the Outcome of Arbitration to which Interwave and Kall replied. However, the parties, with leave of Court, also stipulated to the filing of an Amended Complaint, which Plaintiffs proceeded to do. Rockwell and Ryan's Motion to Stay Proceedings was denied, and Rockwell and Ryan then filed this Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12 (b)(6).

B. Factual Background

1. The Asset Purchase Agreement

Early in 2003, Rockwell purchased substantially all of Interwave's assets pursuant to an Asset Purchase Agreement ("APA")(the "Transaction"). Kall was Interwave's president and sole shareholder at the time of sale. Id. ¶ 10. Under the APA, the purchase price for the assets was a combination of $12 million payable at closing and an Earn Out amount of up to an additional $12 million (to be calculated and paid in accordance with Article XIII of the APA). Essentially, the Earn Out consists of a Year One Earn Out payment to Interwave of up to $2 million dollars and a Year Three Earn Out payment to Interwave of up to $10 million dollars, based on revenues calculated pursuant to definitions contained in the APA and recorded by Rockwell for the period from May 1, 2003 to April 30, 2004 (Year One Earn Out Revenue) and from May 1, 2005 to April 30, 2006 (Year Three Earn Out Revenue), (collectively, the "Earn Out"). Id. ¶ 16.

As part of the Transaction, Kall entered into a 39-month employment contract (the "Employment Agreement"), by which Rockwell hired Kall to serve as Rockwell's Director of Manufacturing Business Solutions division ("MBS"). Subsequently, this division was renamed Information Systems ("IS") and included Interwave's Manufacturing Execution Solutions ("MES"). The 39-month employment term was intentionally consistent with the length of the total Earn Out measurement period under the APA, which period is due to expire on April 30, 2006. Id. ¶¶ 18-19.

2. Defendants' Alleged Conduct

a. Coordinator Software and MES Solutions

Prior to closing on the Transaction, Interwave was in the process of filing a patent application with the U.S. Patent and Trademark Office for its "Coordinator" software, which was sold to Rockwell as part of the Transaction. Post closing sales were critical to Interwave in order

to achieve the Earn Out revenues and subsequent Earn Out Payments, especially with regard to the Year Three Earn Out. The Coordinator software was designed to be used in combination with MES or related software products to provide more "out of the box" MES solutions to potential MES customers. Id. ¶ 26-29. Ryan knew the Coordinator software needed to be paired with an existing comprehensive MES software product or layered/developed over a plant floor software suite of products to derive any beneficial commercial application. Id. ¶¶ 34, 52.

In early August 2002, at meetings at the Best Western Motel in Exton, Pennsylvania, Ryan allegedly represented to Interwave that subsequent to closing on the Transaction, Rockwell would put a "team" on the development of Coordinator software. Id. ¶¶ 27-30, 33. Prior to closing on the Transaction, Rockwell represented it would also enter into partnerships with existing vendors which possessed comprehensive MES software products in order to develop a capability to deliver comprehensive MES solutions and integration services while Rockwell was developing its own competitive MES software products (via Coordinator development) to deliver comprehensive and/or partial MES solutions and integration services to achieve MES sales and revenue post closing in fulfillment of the Earn Out obligations contained in Article XIII of the APA. Id. ¶35.

However, according to the Complaint, after closing on the Transaction, Rockwell failed to approve fully negotiated partnerships with third party vendors possessing comprehensive MES "third party products" necessary for comprehensive MES solutions, and failed to accept offered contracts. Plaintiffs allege that this resulted in the loss of at least two multi-million dollar comprehensive MES solution projects that would have generated substantial revenue to the IS Division and at least between $20 million and $25 million in additional revenue toward the calculation of Year One and Year Three Revenue. Id. ¶ 54.

Additionally, Rockwell allegedly removed key IS Division software development personnel from the development of Coordinator initiative to work on other Rockwell projects. Rockwell also failed to devote any meaningful resources or effort toward development of a comprehensive MES software product, which, in combination with Rockwell's failure to approve fully negotiated partnerships with existing comprehensive third party vendors, and its failure to accept offered contracts, allegedly crippled the ability of Interwave/IS to offer comprehensive MES solutions which represented virtually all of Interwave's entire pre-closing business. As a result, Plaintiffs did not attain the negotiated revenue targets for the Year One Earn-Out. Id. ¶ 55.

b. Alleged Sales Leads

On July 8, 2002, Ryan met with Kall to discuss the terms and conditions of the proposed transaction between the parties. At that meeting, which took place at the Philadelphia Airport Marriott, Ryan represented to Interwave that, subsequent to Rockwell's purchase of Interwave as proposed, the new Interwave/Rockwell would have access to "more leads than Interwave/Rockwell could handle," it would have access to existing Rockwell customers, and Rockwell had more "Scheduling" software business than the new Interwave/Rockwell could perform. Id. ¶ 31.

After the Transaction closing, however, Interwave discovered that Rockwell was not aligned, and had never been aligned, to provide substantive leads or customers to the new Interwave/Rockwell and Rockwell had very little "Scheduling" software business as had been represented. Id. ¶ 32. Thus, Interwave claims that Rockwell failed to provide Interwave/IS access to qualitative leads from Rockwell's sales channel and, instead, raised impediments to the ability of Interwave/IS to sell to its existing customers through this sales channel. Id. ¶ 51.

c. Calculation of Earn Out Provisions

In late December 2002, Ryan represented to Interwave's agents, including Kall, that in Ryan's view, the definition of "Implementation Services" set forth in the APA to be executed by the parties included all revenue for hardware and software sold as part of a solution, including Rockwell hardware and software. Ryan also represented at this time that for purposes of calculating the Earn Out, again as Ryan interpreted the contract definitions, all services provided or performed by Rockwell's existing MBS business group and by Interwave's existing MES business were to be included in the definition of "Implementation Services." Furthermore, prior to closing on the Transaction, Plaintiffs contend that Ryan consistently represented to Interwave that all revenue from consulting and/or services performed by any MBS/Interwave employees would be included in the calculation of revenue applicable to the Earn Out. Id. ¶¶ 40, 42-43.

According to Plaintiffs, however, Rockwell has refused and continues to refuse to include as revenue the total price for hardware and software sold as part of solutions sold and/or for services by Rockwell's IS division (a combination of Rockwell's former MBS business and Interwave's pre-closing MES business) or as part of its calculation of the Earn Out and specifically in its calculation of Year One Revenue as that term is defined in Article XIII of the APA as represented by Ryan. Rockwell denies that it ever intended to do so. Id. ¶ 39.

Rockwell continues to refuse to include in the calculation of revenue applicable to the Earn Out, and specifically in its calculation of Year One Revenue, all revenue from consulting and/services performed by MBS/Interwave employees, performed by a previous Interwave employee or performed by a Rockwell employee as represented by Ryan, and denies that it ever intended to do so. Id. ¶¶ 41, 44.

d. Tracking revenues

Interwave also claims that prior to closing on the Transaction, Ryan also represented to Interwave that Rockwell's structure, processes and infrastructure were aligned and its sales channel, structure and processes were configured so as to enable Interwave to achieve, and Rockwell to track, the revenues subject to the Earn Out. However, in actuality, according to Plaintiffs, at the time of the closing and during the measuring period of the Earn Out, including the Year One Revenue measuring period, Rockwell's structure, processes and infrastructure were not aligned, and its sales channel, structure and processes were not configured, so as to enable Interwave to achieve, and Rockwell to track, the revenues subject to the Earn Out. Id. ¶¶ 45-46.

e. Jonathon Kall's Role After the Transaction

Rockwell represented to Interwave and Kall that post closing Kall was to be put in charge of the combined Rockwell existing MBS Business and the former Interwave MES Business ("MBS/Interwave"), and would be responsible for the sales and revenue to be included in the Year-One and Year-Three Earn Out revenue provided for in Article XIII of the APA. Id. ¶ 47.

However, subsequent to closing, Rockwell refused and failed to put Kall in charge of the combined MBS/Interwave business or its sales, technical and service employees as represented. Therefore, Kall was not, as represented to Interwave, in charge of sales and revenue referred to in Article XIII of the APA. This, too, according to Interwave, had a direct negative impact on Interwave's ability to achieve the Earn Out. Id. ¶¶ 47-48.

f. Reorganization of Rockwell

Kall's employment was terminated by Rockwell on June 22, 2004, and Rockwell immediately reorganized, transferred key IS personnel to other divisions, fired or transferred the entire IS sales force and eventually eliminated completely the former Rockwell IS division,

making it structurally impossible for Interwave to achieve, or for Rockwell to appropriately track and record, revenue applicable to Interwave's Year Three Earn Out. Id. ¶ 57.

g. Retention Bonuses Under the APA

Section 10.2 (b) of the APA provides for the payment of Retention Bonuses to certain key employees who were in the employ of Interwave at the time of closing on the Transaction. Pursuant to the terms of the APA, the Retention Bonuses were to create an incentive for the listed employees to remain in Rockwell's employ and to provide an incentive for those employees to "meet financial objectives." Id. ¶ 63-64.

Beginning in 2003, various listed employees allegedly indicated to Rockwell their concerns as to the inability to achieve the Year One Earn Out target revenues set out in their Retention Agreements (and matched in the APA), and thus the Retention Bonuses, all due to Rockwell's actions and/or omissions. In response to these concerns, Rockwell compensated the listed employees with retroactive pay increases, stock grants, and, with respect to most of the listed employees, lump sum payments in an amount equal to what they would have received if the Year One Earn Out revenue goals were achieved. Plaintiffs assert that by making these payments outside of the structure provided for in the APA, Rockwell destroyed the incentive, provided for in Section 10.2 of the APA, of the employees to meet the financial objectives necessary for Interwave to achieve the Earn Out revenues and thereby undermined Interwave's ability to achieve Earn Out targets. Id. ¶ 65-69.

h. Reporting Revenue Under the APA

In early July, 2004, Interwave and Kall received from Rockwell a Year One Earn-Out Statement dated June 29, 2004 and signed by John McDermott Senior Vice President of Rockwell, indicating a calculation of Year One Earn Out revenue of $4,513,815.00, resulting in

no earn out payment to Interwave. Kall requested access by "Seller's Representatives" to Rockwell "personnel, properties, books and records" necessary to prepare a Notice of Disagreement with the Year One Earn-Out Statement and to conduct an audit and inspection in accordance with Section 13.1(f) and (g) of the APA. Rockwell denied access to all but one of the requested personnel and provided only very limited access to the books and records requested by Interwave in order to properly prepare its Notice of Disagreement. Id. ¶¶ 70-75.

i. Summary of Plaintiffs' Claims

In summary, Plaintiffs allege that Rockwell has breached Sections 4.1, 7.2, 9.3, 10.2, 13.1 (f) and (g), and Article XIII of the APA , as well as the implied covenants and obligations of good faith and fair dealing. (Counts I and IV). Plaintiffs also assert actions in deceit and fraudulent inducement claims against both Rockwell and Ryan (Counts II and III).

II. DISCUSSION

A. The Legal Standard

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 2004). When considering such a motion to dismiss, the Court must accept the complainant's allegations as true, Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984), and must consider "all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). A complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon, 467 U.S. at 73. See also Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) ("a complaint should not be dismissed for

failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

The pleading standards against which this Complaint is to be measured are those set out in the Federal Rules of Civil Procedure, most notably Fed.R.Civ.P. 8(a) and (e), which call upon the pleader to present "a short and plain statement of the claim" where "each averment . . . shall be simple, concise, and direct." The Supreme Court described the simplified pleading permitted by the Federal Rules as that which "will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley, 355 U.S. at 47. Indeed, the Supreme Court has reaffirmed these liberal notice-pleading requirements by noting that a *prima facie* case is "an evidentiary standard, not a pleading requirement." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002).

B. Subject Matter Jurisdiction

Rockwell and Ryan argue that mediation is a condition precedent that must be fulfilled in order for this Court to have subject matter jurisdiction under § 14.16 of the APA. Rockwell contends that because Interwave and Kall filed suit before the mediation process was complete, there was no subject matter jurisdiction for the original Complaint, and therefore any fraud claims in the Amended Complaint are now untimely and should be dismissed pursuant to the statute of limitations.

Interwave and Kall counter this argument by posing that, by denying Defendants' initial motion to dismiss without prejudice and granting the Plaintiffs' Motion to Stay, the Court already rejected Defendants' argument that there is no subject matter jurisdiction prior to the conclusion of mediation. Interwave and Kall also contend that §14.13 of the APA which "submits [disputes] to the exclusive jurisdiction of the United States District Court for the

Eastern District of Pennsylvania" gives this Court jurisdiction, and even if it had not, the non-binding arbitration requirements of the contract have already been satisfied.

When Interwave and Kall initiated suit and sought to stay proceedings pending the mediation they acted consistently with §14.16. As drafted, the dispute resolution section of the APA does not prohibit filing suit and staying the suit pending the mediation. Rather, §14.16 states "the parties will attempt in good faith to resolve such Dispute by mediation...[i]f such mediation is unsuccessful within ninety days after commencement thereof, either party may pursue any other remedies available to it."

Under Rockwell's theory, under this particular contract, Interwave's failure to engage exclusively and exhaustively in mediation in accordance with §14.16 could operate to extinguish Plaintiffs' claims by operation of the statute of limitations because this Court would not have jurisdiction of claims brought prior to mediation, and claims filed subsequent to the completion of the mediation would risk being untimely inasmuch as the APA has no timing mechanism for compelling the start of mediation, although it does allow for the parties to pursue other avenues if mediation is not successful within 90 days of commencing mediation. At best, the APA is ambiguous on this point, and Plaintiffs correctly point out that the Court declined to accept the challenge made by the Defendants in their initial Motion to Dismiss and Opposition to Plaintiffs' Motion to Stay. Further, as Interwave and Kall argue, none of the cases cited by Rockwell dealt with subject matter jurisdiction during the pendency of a non-binding mediation process already commenced by the plaintiff at the time of the suit.[1] Here, Plaintiffs sought mediation, and by

[1] See e.g., Ziarno v. Gardner Carton & Douglas, LLP, No. 03-3880, 2004 WL 838131, at *3 (E.D. Pa. April 8, 2004)(the court held it lacked subject matter jurisdiction because the parties failed to submit their dispute to contractually mandated mediation/arbitration); Darling's v. Nissan North America, Inc. 117 F.Supp.2d 54, 61 (D.Me. 2000)(the court held plaintiff was required to make written demand for nonbinding mediation as a prerequisite to filing its lawsuit); Bill Call Ford, Inc. v. Ford Motor Co., 48 F.3d 201, 208 (6th Cir. 1995) (claim that franchisor did not adequately reimburse franchisee for warranty repairs was barred by franchisee's failure to seek mediation); DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 336 (7th Cir. 1987) (substantial

staying this suit during that mediation, waited to pursue "other remedies available to it" until after the attempt at mediation failed. Therefore, Defendants' argument that this Court lacks subject matter jurisdiction fails due to its overly preclusive, unwarranted, and erroneous interpretation of §14.16.

C. Standing

Rockwell argues that Interwave lacks standing because it has assigned its claims under the APA to Kall. Plaintiffs respond by arguing that to the extent Interwave has alleged causes of action not related to the APA, such as Counts II and III's claims of fraudulent inducement and deceit against both Rockwell and Ryan, Interwave should remain a party to the action.

"Under Pennsylvania law, which the parties treat as applicable, a contracting party that has assigned its contract rights to a third party does not have standing to enforce that contract." Sanford Inv. Co. v. Ahlstrom Mach. Holdings, Inc., 198 F.3d 415, 420 (3d Cir. 1999) (citing

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compliance with dispute resolution provisions did not excuse the plaintiff's failure to present claim to defendant's policy board as condition precedent to suit); HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41, 44 (1st Cir. 2003)(the court held that owner could not compel arbitration where neither party had requested mediation because the contracting parties conditioned an arbitration agreement upon the request by either party for mediation); Kemiron Atlantic, Inc. v. Aguakem Intern., Inc., 290 F.3d 1287, 1291 (11th Cir. 2002) (under the contract, to invoke the arbitration provision, either party had to request mediation and provide notice of the request to the other party, where neither condition was met, arbitration was precluded); Mortimer v. First Mount Vernon Indus. Loan Ass'n , No. 03-1051, 2003 WL 23305155, at *2 (D. Md. May 19, 2003) (court dismissed plaintiff's claim when plaintiff failed first to submit to mediation in accordance with the contract); Ponce Roofing, Inc. v. Roumel Corp., 190 F.Supp.2d 264, 267 (D.P.R. 2002)(court dismissed suit where parties failed to first mediate as required by the contract); Ventre v. Ventreu, No. 377184S, 2001 WL 100326, at *1 (Conn. Super. Ct. Jan. 9, 2001) (court dismissed case where it found mediation was a condition precedent for bringing suit); Coburn v. Grabowski, No. 960134935, 1997 WL 309572, at *3 (Conn. Super. Ct. May 29, 1997) (without addressing whether or not the plaintiff even sought mediation or filed for a stay, the court held "[t]he language of the instant contract indicates the clear intention of the parties that mediation should be a condition precedent to bringing a court action. Since that condition precedent was not satisfied prior to the filing of this court action, the court finds that it does not have subject matter jurisdiction and thereby grants the defendants' Motion to Dismiss."); Gould v. Gould, 523 S.E.2d 106, 108 (Ga. App. 1999) (court determined relief was precluded by mother's failure to comply with provision in divorce decree requiring parties to submit disputes concerning their minor children to mediator or family counselor before litigating); Absher Const. Co. v. Kent School Dist. No. 415, 890 P.2d 1071, 1076 (Wash. Ct. App. Div. 1 1995) (court found the contract provided a mandatory procedure to resolve claims for extra work caused by deficient plans and specifications and found the plaintiff waived the claim by failing to follow those procedures).

West Penn Admin., Inc. v. Pittsburgh Nat'l Bank, 433 A.2d 896, 902 (Pa. Super. Ct. 1981)). But as the Plaintiffs properly state, and Defendants seem to agree[2], to the extent that Interwave has causes of action outside the fair scope of the assignment of its rights to Kall, Interwave shall remain a party to this action. As discussed below, the Court concludes that Interwave may pursue its fraudulent inducement claim against Ryan only.

D. Breach of Contract

To survive Defendants' motion to dismiss Counts I and IV, Plaintiffs must have properly pleaded the elements of a cause of action for breach of contract, namely (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. Contawe v. Crescent Heights of Am., Inc., No. 04-2304, 2004 WL 2244538, at *3 (E.D. Pa. Oct. 1, 2004).

Rockwell argues that Plaintiffs' breach of contract claim seeks to "expand the provisions of an unambiguous contract," rather than alleging a breach of an express term of the APA. Rockwell also contends that the contract at issue expressly disavows any implied obligations, and that all of the Rockwell's alleged implied breaches were actually expressly authorized conduct under the contract, specifically permitted by §7.5 (no representation or warranty in regard to future business operations or financial performance), §13.1(d) (no-minimum earn-out guarantee), and the MBS definition (employee list is subject to change or reorganization at the discretion of the buyer).

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[2] At oral argument, as to the proposition that Interwave had standing if the fraud claims were allowed to continue, counsel for the defendant acknowledged as much: "As to the fraud claim, I believe that is correct." Tr. of Oral Argument at 29, lines 7-8.

Plaintiffs argue that the breach of contract claims survive because there is a basis for each breach claim in the Amended Complaint, including breach of the implied covenant of good faith and fair dealing. Plaintiffs further respond that Rockwell improperly interprets §7.5, §13.1(d), and the MBS definition to disavow any good faith obligation and to override obligations created by other provisions in the APA.

1. Breach of Express APA Provisions

In response to Rockwell's invocation of the §7.5 and §13.1(d) disclaimers, Plaintiffs argue they have stated a claim for breach of contract under specific sections of the contract based on their allegations concerning actions taken by Rockwell and Ryan. Plaintiffs claim that Rockwell engaged in restructuring, making it impossible to achieve Earn-Outs; failed to approve appropriate business initiatives and fully negotiated contracts and partnerships required to generate the earn-out; and failed to provide access to sales channels. Am. Compl. at ¶¶ 51-59, 115. Plaintiffs assert these claims allege breaches of specific APA provisions such as §4.1 ("buyer will...pay to seller the earnout amounts"), §7.2 ("buyer has all requisite power and authority...to perform all of its obligations"), and §9.3(a)(each "party will...take, or cause to be taken, all such reasonable actions, as such other party may reasonably deem necessary or desirable to consummate the Transaction").

Plaintiffs also point out that they allege in their Amended Complaint that Rockwell breached §10.2 (employee bonuses based on Earn-Out revenue) by making payments equivalent to the Earn-Out bonuses, but doing so prior to the measuring period for the Earn-Out bonuses in order to reduce employee incentives to meet the financial objectives under the APA. Am. Compl. at ¶¶ 63-69. Finally, Interwave and Kall allege Rockwell's failure to comply with §13.1(f) (Earn-Out record keeping requirement) and §13.1(g) (Earn-Out Statement requirement)

in ¶¶ 70-80 and 117-119 of the Amended Complaint by contending that Rockwell never demonstrated its record keeping or properly disclosed its earn-out statements.[3]

When these allegations are viewed with all reasonable inferences in favor of the Plaintiffs, the Court concludes that Plaintiffs have stated a claim of breach of contract upon which relief could be granted. Therefore, it would be premature to dismiss claims for breach of these express provisions of the APA.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

Pennsylvania has adopted the general duty of good faith and fair dealing in the performance of a contract as set forth in the Restatement (Second) of Contracts § 205. Creeger Brick & Building Supply Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153 (1989). See also Baker v. Lafayette College, 504 A.2d 247, 255 (1986), aff'd, 532 A.2d 399 (1987). A similar requirement has been imposed upon contracts within the Uniform Commercial Code. 13 Pa.C.S. §1203; Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992).

"Good faith" is defined as "[h]onesty in fact in the conduct or transaction concerned." Id. (citing 13 Pa.C.S. §1201). Examples of bad faith can include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Id. (quoting Restatement 2d of Contracts, §205 comment(d)).

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[3] Plaintiffs also argue that Rockwell failed to address Plaintiffs' breach claims under §10.2, §13.1(f) (Earn-Out record keeping requirement) and (g) (Earn-Out Statement requirement), Article XIII, and implied covenants in its initial Motion and instead only addressed those claims in its Reply, and, therefore, the claims should survive on this basis alone under Federal Rule of Civil Procedure Rule 12(g). Plaintiffs also argue that Defendants concede in their papers that Plaintiffs have properly plead a breach based on improper calculation of the year one Earn-Outs. While there may be a basis to deny the portions of the motion on the grounds that the arguments were not made until the Reply was submitted, the Court has addressed the substance of these issues and concludes that denial of these aspects of the Motion based on the merits is appropriate.

Rockwell argues that the implied covenant of good faith and fair dealing does not apply in this situation because the Third Circuit Court of Appeals has limited the application of implied covenants. Rockwell cites to Northeast Jet Center, Ltd. v. Lehigh-Northampton Airport Authority, No. 90-1262, 1996 WL 442784, at *18 (E.D. Pa. Aug. 1, 1996), for the proposition that an "independent duty of good faith has been recognized only in limited situations. After all, if contracting parties cannot profitably use their contractual powers without fear that a jury will second-guess them under a vague standard of good faith, the law will impair the predictability that an orderly commerce requires." (citing Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995). Rockwell also points out that "courts are not generally available to rewrite agreements or make up special provisions for parties who fail to anticipate foreseeable problems." In re Estate of Hall, 535 A.2d 47, 56 n.7 (Pa. 1987). Moreover "[t]he law will not imply a different contract than that which the parties have expressly adopted. To imply covenants on matters specifically addressed in the contract itself would violate this doctrine." Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 388 (Pa. 1986).

However, Rockwell fails to appreciate a complete understanding of the holding in Northeast Jet Center as it is based on the Court of Appeals' application of the implied covenant of good faith in Duquesne. Duquesne, as interpreted in Northeast Jet Center, was based on application of the implied covenant of good faith "in the absence of a dispute about the parties' reasonable expectations under a particular term of the contract." Duquesne, 66 F.3d at 618. In Duquesne, the Third Circuit Court of Appeals explained that courts "generally utilize the good faith duty as an interpretive tool to determine the *parties' justifiable expectations*, and do not enforce an independent duty divorced from the specific clauses of the contract." Id. at 617

(citations omitted) (emphasis added). It is the permissible use of the "interpretive tool" that Rockwell overlooks.

Wielding this tool, Interwave and Kall construct a claim from their allegations that "[b]y including an Earn Out as part of the purchase price consideration in Section 4.1 of the APA, Plaintiffs could expect that Rockwell would act in good faith to generate additional purchase price consideration in the form of an earn out and not in frustration of that purpose." Interwave also fastens its breach implied covenant argument directly to multiple provisions of the APA in paragraph 127 of its Amended Complaint.[4] Additionally, the Amended Complaint at ¶¶ 113, 127 cites Section 9.3 of the APA as a contractual basis for an implied good faith duty. Section 9.3 states that the parties will take "all such reasonable actions, as such that the other party may reasonably deem necessary or desirable to consummate the Transaction."

Rockwell counters with the express disclaimers of §7.5 and §13.1(d) in the contract which Rockwell claims work to specifically disclaim implied obligations. Section 13.1(d) specifically states: "Buyer makes no express or implied representations with respect to either the One Year Earn-Out Payment or the Three Years Earn-Out Payment." Therefore, Rockwell argues, implied obligations are allowed only when there are no express terms relating to that particular issue. See U.S. Small Bus. Admin. v. Progress Bank, No. 03-3461, 2004 WL 2980412 at *4 (E.D. Pa. Dec. 22, 2004).

Interwave and Kall claim that Rockwell engaged in a series of actions and omissions that effectively reduced Rockwell's earn-out payments, including Rockwell's refusal to allow Plaintiffs to use Rockwell's sales channels, its refusal to accept contracts that would have

[4] Paragraph 127 of the Amended Complaint states: "Rockwell's conduct as aforesaid further constitutes a breach of Rockwell's implied covenants, duties and obligations of good faith and fair dealing under Section 4.1, Article XII of the APA, Section 9.3 of the APA, Section 13.1(f) and (g) and Section 10.2 of the APA."

generated substantial revenue by the IS division, and diversion of key personnel from the development of the Coordinator initiative. Am. Compl. ¶¶ 51, 54-55.

To support the claim that these actions by Rockwell amount to a sufficient allegation of Rockwell's breach of the implied covenant of good faith, Interwave and Kall cite to T.R. McClure & Co, v. TMG Acquisition Co., No. 99-537, 1999 WL 692683 (E.D. Pa. Sept. 7, 1999)[5]. In McClure, the plaintiff alleged conduct that "resulted in the determination of lower earn-out payments than would have been granted had the defendants not breached." Id at *2. Denying a defense motion for summary judgment prior to discovery on a claim of breach of the implied duty of good faith and fair dealing, the court held "the Earn-out Agreement's Terms envision that [Defendant] would, if feasible, act so as to generate additional purchase price consideration. It is reasonable to require that, in doing so, [Defendant] act in good faith to make the parties' expectations come to fruition." In particular, the court found that:

> Finding [defendant] liable of a breach of its contractual obligations to plaintiff if it acted in bad faith by setting unreasonable prices and unacceptable schedules, or undercapitalizing [plaintiff's business], even though the Earn-Out Agreement does not set forth any minimal requirements, would not be tantamount to rewriting the contract or adding additional terms. Rather, it would simply be enforcing [defendant's] obligation to act reasonably and in good faith in fulfilling the parties' expectations.

Id. at *7.

Interwave and Kall also urge the Court to adopt the approach of the court in O'Tool and Horizon Holdings LLC v. Genmar Holdings, Inc., 387 F.3d 1188, 1196-97 (10th Cir. 2004), which stated that "[t]he obvious spirit of the [earn-out] was that [Plaintiffs] would be given a fair

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[5] McClure involved the application of New York law, rather than Pennsylvania law. But, just as in Duquesne, where the Third Circuit Court of Appeals recognized good faith to include justified expectations, New York courts also see good faith obligations as those "promises that a reasonable promisee would understand to be included." McClure at *6 (citations omitted). Thus, the citation to McClure is instructive here.

opportunity to operate the company in such a fashion as to maximize the earn-out consideration available under the agreement."[6]

This implied duty had been applied to limit the possibility of self-dealing conduct such as "where the contract grants one party discretion over some aspect of performance, for in these cases the party accorded discretionary power can opportunistically subvert the legitimate expectations of the other party. Curley v. Allstate Ins. Co., 289 F. Supp. 2d 614, 617 (E.D. Pa. 2003)(citing Huang v. BP Amoco Corp., 271 F.3d 560, 564-65 (3d Cir. 2001); Goldstein v. Johnson & Johnson, 251 F.3d 433, 444 (3d Cir. 2001); Baker v. Lafayette College, 504 A.2d 247, 256 (Pa. Super. Ct. 1986). The conduct alleged here arises in connection with the matters over which Rockwell had just such discretionary power, making these cited cases instructive and useful in this case.

Rockwell admits, as it must, that its argument on this issue turns on the scope given to the disclaimers in §7.5 and §13.1(d) of the APA. During oral argument, when specifically challenged on the appropriate scope of these disclaimers, Defendants' counsel stated: "Nothing more than what is in here is what we are promising. And there are representations, and there are warranties, and there are promises as to what they are willing to do. Other than that, nothing more implied." Tr. of Oral Argument at 60, lines 2-5.

The Court does not agree that "nothing more" here is implied. The Court of Appeals for the Third Circuit has held:

> One of the most important principles of contract law is the implied covenant of good faith. Such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman,

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[6] Rockwell attempts to distinguish McClure and O'Tool by arguing there were no express disclaimers like §13.1(d) of the APA in those cases. However, Rockwell's attempt to distinguish these cases ultimately is unhelpful in the absence of a viable "interpretive tool" to broaden §13.1(d) to disclaim the duty to act in good faith.

> and every slip was fatal. Hence where it is clear that an obligation is within the contemplation of the parties at the time of contracting or is necessary to carry out their intentions, the court will imply it...even where the contract itself is not ambiguous.

Huang v. BP Amoco Corp., 271 F.3d 560, 564-565 (3d Cir. 2001) (citations omitted).

While Section 13.1(d) of the APA disclaims "implied representations with respect to either the One Year Earn-Out Payment or the Three Years Earn-Out Payment," of significance to the instant challenge, Section 9.3 of the APA states that the parties will take "all such reasonable actions, as such that the other party may reasonably deem necessary or desirable to consummate the Transaction." When the allegations in the Amended Complaint are evaluated in a light most favorable to the Plaintiff and all reasonable inferences are drawn in their favor, the Amended Complaint does in fact succeed at least in alleging breach of the implied covenant of good faith and fair dealing. Here, as in McClure, the Earn-Out payment constituted a bargained for element of the purchase price. While §13(d) of the APA does state that "Buyer makes no express or implied representations with respect to either the Year One Earn-Out Payment or the Year Three Earn-Out Payment", Plaintiffs have properly alleged that Defendants took actions specifically to reduce the earnout amount under the APA and, therefore, are in violation of the good faith obligation.

Therefore, while the doctrine of the implied covenant of good faith and fair dealing may be limited by implied duties based on reasonable expectations emanating from specific language in the contract, the Court finds that Interwave and Kall have presented enough in their pleading to survive a motion to dismiss. Rockwell's discovery will no doubt be directed strongly at these issues. In the absence of wholly explicit and unambiguous contractual language specifically defining the parties' expectations concerning actions necessary to consummate the Transaction,

it would be inappropriately precipitous at this time to dismiss Interwave's and Kall's breach of an implied covenant of good faith claim. See e.g., Curley v. Allstate Ins. Co., 289 F. Supp. 2d 614, 619 (E.D. Pa. 2003).

E. Gist of the Action Doctrine

The "gist of the action" doctrine, recognized under Pennsylvania law, precludes tort claims based on a party's failure to comply with a contract. Both sides here advance their arguments on this issue by relying on EToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10 (Pa. Super. Ct. 2002), in which the Superior Court of Pennsylvania addressed this doctrine and analyzed federal district courts' interpretations of the doctrine in relation to fraud claims. Id. at 15-16. The court in EToll determined that, as applied by federal courts, the gist of the action doctrine bars tort claims: (1) arising solely from a contract between the parties, (2) where the duties allegedly breached were created and grounded in the contract itself, (3) where the liability stems from a contract, or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. Id. at 19.

Here, Rockwell argues that Plaintiffs' claims for breach of contract and for fraud cover the same activity and are predominantly contract claims, as opposed to fraud claims. Therefore, according to Rockwell, the fraud claims are barred by the gist of the action doctrine because the fraud claims are based on Rockwell's alleged failure to comply with the contract. To bolster its contention on this point, Rockwell argues that the damages Interwave and Kall seek as a remedy for their fraud count are based entirely on the earn-out obligations in the contract. Rockwell also argues that Plaintiffs' hope for use of an exception to the gist of the action doctrine for fraudulent inducement is misplaced because all of the allegations of fraud relate to performance rather than inducement. And, further, Defendants claim that the fraud claims that may relate to

inducement are still prohibited because they are inextricably intertwined with the breach of contract claim.

Interwave and Kall respond by arguing that at the motion to dismiss stage, alternative pleading allows both claims to proceed. Rule 8(d)(2) of the Federal Rules of Civil Procedure states:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

This permissive pleading rule has been applied to cases involving both contract claims and other claims related the same facts. In this District courts have held that "even if the gist of action test and economic loss doctrine were to bar [plaintiff] from proceeding simultaneously on breach of contract and conversion claims, [plaintiff] can still plead both claims as alternative theories of liability." Berger & Montague v. Scott & Scott, 153 F. Supp. 2d 750, 754 (E.D. Pa. 2001). Likewise, fraud and contract claims have survived the gist of the action doctrine at the motion to dismiss stage. See e.g., Little Souls, Inc. v. State Auto Mut. Ins. Co., No. 03-5722, 2004 WL 503538, at *2-3 (E.D. Pa. March 15, 2004) (motion to dismiss denied where plaintiff alleged "misrepresentations occurred both before and after the formation of the contract that, if sufficiently distinct, would not hinge on the outcome of the breach of contract claim.")

By the same token, however, as Defendants have urged, motions to dismiss fraud claims have been granted when the claims relate to the performance of a contract. In Caudill Seed & Warehouse Co. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 834 (E.D. Pa. 2000), for example, the court dismissed a fraud claim where "the agreement is at the heart of plaintiff's ongoing fraud

claim, and therefore the gist of plaintiff's fraud action is unmistakably contractual, not tortious," even though "caution should be exercised in determining the gist of an action at the motion to dismiss stage." Id. Judicial caution is appropriate because "[o]ften times, without further evidence presented during discovery, the court cannot determine whether the gist of the claim is in contract or tort." Weber Display & Packaging v. Providence Wash. Ins. Co., No. 02-7792, 2003 WL 239141, at *3-4 (E.D. Pa. Feb. 10, 2003). In Weber, the court held that "it would be inappropriate to dismiss [plaintiff's] intentional misrepresentation claim at this stage of the proceeding, before any discovery is conducted which could aid in a determination of the 'gist' of this claim." Id.

Interwave and Kall argue that their claims allege fraudulent *inducement* which is not precluded under the gist of the action doctrine. While Rockwell asserts that fraud claims which include damages emanating only from the contract are precluded by the gist of the action doctrine, also citing Williams v. Hilton Group, PLC, 261 F. Supp. 2d 324, 329 (W.D. Pa. 2003), Interwave and Kall counter that they are not seeking the same damages for their contract and fraud claims. To explain, Interwave and Kall argue that they could be awarded as damages the difference between the Cash Consideration to be paid to Interwave at Closing and the reduced Cash Consideration that Rockwell negotiated based on its alleged misrepresentations. Skurnowicz v. Lucci, 798 A.2d 788, 795 (Pa. Super. Ct. 2002). To this Rockwell points out that if the actionable inducement is intertwined with performance of the contract, then the fraudulent inducement claim may not survive. Galdieri v. Monsanto Co., 245 F. Supp. 2d 636, 651 (E.D. Pa. 2002) (fraud claims were barred by the gist of the action doctrine because the fraud claims were "intertwined" with breach of contract claims).

The endeavor of attempting to reconcile the results among the various trial level courts on this issue is challenging, to say the least. One might justifiably question if the goal of consistency is achievable even though it might well be useful. Ultimately, however, each case merits its own analysis under the requirement that, for the purposes of the motion to dismiss, the plaintiff must allege facts in the complaint that if proven, would amount to fraud in the inducement to enter into the contract, with such facts being analytically separable from allegations of breaches in the performance of the contract. Suffice it to say, Plaintiffs here succeed in doing so. These Plaintiffs allege that Rockwell and Ryan misrepresented information concerning the ability of Interwave to achieve the Earn Out portion of the APA, and Plaintiffs do allege that reliance on those representations induced Interwave to enter into the APA. Am. Compl. ¶ 98. Therefore, Interwave's and Kall's fraud claims ought not be dismissed on the basis of the "gist of the action" doctrine at this time.

Although Plaintiffs have alleged enough to survive a motion to dismiss their fraud claims under the gist of the action doctrine, this does not mean they have cleared the hurdle created by the parol evidence rule.

F. The Integration Clause and the Parol Evidence Rule

Rockwell argues that allegations that contradict the express language of the agreement at issue are prohibited by the parol evidence rule. Specifically, Rockwell contends that if the alleged misrepresentation or reliance on it is foreclosed by an integration clause, then a fraudulent inducement claim based on such misrepresentation(s) is barred.

Rockwell relies on §§7.5, 13.1(d), the definition of MBS, and the integration clause at §14.11 to argue that the APA does indeed cover the statements alleged by Interwave and Kall. Section 7.5 of the APA, entitled Limitation of Representation and Warranties, provides:

> Buyer makes no representation or warranty with respect to any financial projections, estimates, budgets of business plans delivered to or made available to Seller concerning Buyer's MBS business (as defined in Section 14 below) or the future business, operations and financial performance thereof.

The MBS definition provides:

> "MBS" means the existing Manufacturing Business Solutions business unit of the Global Manufacturing Solutions group of Rockwell Automation that provides consulting and information systems that enable clients to monitor, analyze, and improve operations. Attached as Schedule 13.1 is a list of the employees as of January 24, 2003 that are part of the MBS Business located in North America. This list is subject to change and/or reorganization at the discretion of the Buyer.

Section 13.1(d) Contingent Payment provides:

> Except for Buyer's obligations to make an earned Year One Earn-Out Payment and the earned Year Three Earn-Out Payment, as adjusted herein, Buyer makes no express or implied representations with respect to either the Year One Earn-Out Payment or the Year Three Earn-Out Payment. There is no minimum earn-out payment expectation by the parties.

Perhaps most importantly, Section 14.11, entitled the Entire Agreement, states:

> This Agreement and the Confidentiality Agreement collectively constitute the entire agreement between the parties with respect to the subject matter hereof and thereof and this Agreement and the Confidentiality Agreement supersede all prior negotiations, agreements and understandings of the parties of any nature, whether oral or written, relating thereto.

Interwave and Kall argue, first, that the integration clause does not apply to the fraud claim against Ryan because they had no contract with Ryan. They also contend that because the parol evidence rule does not preclude evidence of issues not dealt with in the contract, it does not bar their fraudulent inducement claims.

The controlling case in the Third Circuit with respect to Pennsylvania law concerning the interplay of a claim of fraudulent inducement and the parol evidence rule is Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1300 (3d Cir. 1996), where the court of appeals explained:

> The Supreme Court of Pennsylvania found that the parol evidence rule barred consideration of prior representations concerning matters covered in the written contract, even those alleged to have been made fraudulently, unless the representations were fraudulently omitted from the contract. Otherwise, the parol evidence rule 'would become a mockery,' and integrated contracts could be avoided or modified by claims of differing prior representations.

Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1300 (3d Cir. 1996) (citing HCB Contractors v. Liberty Place Hotel Assocs., 652 A.2d 1278, 1279 (Pa. 1995), (quoting Nicolella v. Palmer, 248 A.2d 20 (Pa. 1968)).

The Dayhoff plaintiff argued that it was induced to enter into a distribution contract by the false and misleading statements of the defendant's lawyer regarding the scope and purpose of the contract's termination provision. Dayhoff, 86 F.3d at 1299. The Third Circuit Court of Appeals recognized that the claim involved "allegations of oral representations contrary to express terms of the agreement" and, additionally, that the contract had an integration clause, on the strength of which the court upheld the dismissal of the fraud in the inducement claim. Dayhoff, at 1300-1301.

To make this determination, the Court of Appeals relied on a series of state court decisions which established the framework for applying the parol evidence rule to bar claims of fraud in the inducement. Rockwell also cites these same cases. For example, 1726 Cherry St. Partnership v. Bell Atlantic Properties., 653 A.2d 663 (Pa. Super. Ct. 1995), embraces the proposition that in Pennsylvania, parol evidence cannot be used to prove fraudulent inducement:

> Parol evidence of representations concerning a subject dealt with in an integrated written agreement and made prior to or contemporaneous with the execution of the agreement [should be admitted] to modify or avoid the terms of that agreement only where it is alleged that the parties agreed that those

> representations would be included in the written agreement but were omitted by fraud, accident or mistake.[7]

Id. at 666.

In 1726 Cherry St. the appellants claimed they were fraudulently induced to enter into the sales contracts because the appellee orally misrepresented that it did not intend to purchase a parcel of land in the vicinity of appellants' land and that, had the appellants known of the purchase, they would have insisted on a higher price or not sold at all. But the court determined otherwise:

> The agreement contains an exclusive list of the parcels as to which a price adjustment might be triggered and the [parcel in dispute] is not one of them. Moreover, the agreement states that it is the parties' entire agreement and that there are no other representations or understandings between them. Under these circumstances what the [appellants] seek to do is exactly what the Pennsylvania parol evidence rule forbids: to admit evidence of a prior representation in a fully integrated written agreement.

1726 Cherry St. Partnership v. Bell Atlantic Properties., 653 A.2d 663, 670 (Pa. Super. Ct. 1995).

The Dayhoff court also analyzed the Pennsylvania Supreme Court's decision in HCB Contractors v. Liberty Place Hotel Assocs., 652 A.2d 1278 (Pa. 1995). In HCB, the plaintiff

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[7] The 1726 Cherry St. court continued:

> This is commonly referred to as "fraud in the execution" because the party proffering the evidence contends that he or she *executed* the agreement because he or she was defrauded by being led to believe that the document he or she was signing contained terms that were actually omitted therefrom. Such a case is to be distinguished from a "fraud in the inducement" case...where the party proffering evidence of additional prior representations does not contend that the parties agreed that the additional representations would be in the written agreement, but rather claims that the representations were fraudulently made and that but for them, he or she never would have entered into the agreement.

1726 Cherry St. Partnership v. Bell Atlantic Properties., 653 A.2d 663, 666 (Pa. Super. Ct. 1995) (emphasis added).

Interwave's case against Rockwell does not involve fraud in the execution. Plaintiffs' Counts II and III entitled Action in Deceit and Fraudulent Inducement forthrightly allege that Plaintiffs agreed to Article XII of the APA "[a]s a direct and proximate result of [the defendants] fraud, misrepresentations and deceit." Am. Compl. ¶¶ 102, 109.

general contractor claimed mechanics' liens even after agreeing to a lien waiver, arguing it was fraudulently induced into agreeing to the waiver. The Supreme Court of Pennsylvania rejected this argument, holding that the plaintiff's claims related to subjects that were specifically addressed in the written contract that included a "Waiver of Liens" provision: "This Agreement waiving the right of lien shall be an independent covenant . . . and shall be enforceable by Owner and such Other Owners, or any of them, and their respective successors and assigns." Id. at 1280. The integration clause of the contract in HCB expressly disclaimed all prior oral representations: "This Contract represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, whether written or oral." Id.

Pennsylvania courts have frequently applied the distinction between fraud in the execution and fraud in the inducement when considering the role of the parol evidence rule. The analysis is straightforward: "[W]here the assertions put forth by one party are specifically contradicted by the written agreement...parol evidence is admissible only to prove fraud in the execution, not the inducement, of the contract." Abel v. Miller, 437 A.2d 963, 965 (1982). In 1726 Cherry St., supra, the court cautioned: "if plaintiffs relied on any understanding, promises, representations or agreements made prior to the execution of the written contract...they should have protected themselves by incorporating in the written agreement the promises or representations upon which they now rely." 1726 Cherry St. Partnership v. Bell Atlantic Properties., supra at 669 (quoting Bardwell v. Willis Company, 100 A.2d 102, 105 (Pa. 1953).

Interwave and Kall respond by claiming that the conduct and conditions underlying the fraud claims, such as Rockwell's access to sales leads, Rockwell's intention to develop complementary software products, Rockwell's organizational structure and ability to track

revenues attributable to the earn out calculation, and Rockwell's intention to place Kall in charge of the revenue streams attributable to the earn out calculation, are not matters that are specifically dealt with in the APA or related to matters addressed un the agreement. According to Plaintiffs, because those issues do not concern subjects dealt with in the integrated written agreement, they are not subject to the parol evidence rule. To advance their argument on this point, Plaintiffs cite In re Estate of Hall, 535 A.2d 47, 55 (Pa. 1987) ("when the terms of a written agreement are at issue, the parol evidence rule bars admission of oral representations made before or contemporaneously with the subject contract, only if those representations concern a matter specifically dealt with in the contract itself.") (emphasis added). Therefore, the question that must be answered to determine whether the fraudulent inducement claims are permitted notwithstanding the parol evidence rule in Pennsylvania is whether or not the APA covers the specific representations alleged by Interwave and Kall.

> When does the oral agreement come within the field embraced by the written one? This can be answered by comparing the two, and determining whether parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made. If they relate to the same subject-matter and are so interrelated that both would be executed at the same time, and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing. This question must be determined by the court.

Gianni v. R. Russell & Co., 126 A. 791, 792 (Pa. 1924).

More recently the Pennsylvania Superior Court has come to a similar conclusion concerning a real estate dispute:

> In the instant case, Appellants signed a contract that stated that it was the parties' whole agreement and that there were no representations made by the Appellees regarding the condition of the property. Appellants also agreed that they had either inspected the premises or had waived the right to do so and were not purchasing the property in reliance upon any representations by Appellees. But now Appellants are before this Court asserting a claim for fraud in the inducement in an effort to disavow the terms to which they expressly agreed.

> Under the facts of this case, the parol evidence rule bars the evidence of [Appellees'] alleged misrepresentation that "there were not problems" with the property.

Youndt v. First Nat'l Bank, 868 A.2d 539, 548-49 (Pa. Super. Ct. 2005).

The problem for the Plaintiffs here is not unlike that confronting the plaintiff in Titelman v. Rite Aid Corp., No. 00-2865, 2001 U.S. Dist. LEXIS 24049, 15-16 (E.D. Pa. Nov. 13, 2001):

> There is no sound reason to allow a fraud in the inducement claim to go forward when the plaintiff alleges that he relied on allegedly fraudulent statements that he did not insist be included in the final written contract. Pennsylvania's parol evidence rule seeks to protect parties from fraudulent inducement claims which could have been prevented by more complete, more thorough contract formation.

Integration clauses and contract terms that specifically cover the subject matter of the alleged fraudulent inducement frequently result in dismissal of fraudulent inducement claims in the Third Circuit pursuant to the Dayhoff rubric discussed above. For example, in Goldstein v. Murland, No. 02-247, 2002 WL 1371747, at *2 (E.D. Pa. June 24, 2002), the court granted a motion to dismiss claims of fraudulent inducement because "Pennsylvania law prohibits recovery on a claim of fraud in the inducement where the contract represents a fully integrated written agreement." In that case the integration clause in the relevant agreement is similar to the clause in §14.11 of the APA here, and the Murland court concluded that "[t]he contract contains no provisions relating to the alleged representations made... Accordingly, the written agreement is fully integrated and dismissal of the fraud/fraud in the inducement claims is appropriate." Id. at *3.

Similarly, in North Am. Roofing & Sheet Metal Co. v. Building & Constr. Trades Council, No. 99-2050, 2000 WL 230214, at *5 (E.D. Pa. Feb. 29, 2000), the court also dismissed fraudulent inducement claims when the plaintiff alleged a failure to disclose key information about the likelihood of being "forced off the project by the unions." The court held that the

plaintiffs "should have insisted that the representation be set forth in the integrated written agreements. Failure to do so results in evidence of the representation being barred." Id. at *7. See also Winters v. Inv. Sav. Plan for Employees of Knight-Ridder, Inc., 174 F. Supp. 2d 259, 263 (E. D. Pa. 2001) ("the agreement states that 'this agreement constitutes the entire Agreement between the Parties.' Here, plaintiff's argument that she was fraudulently induced into signing the agreement is barred by the parol evidence rule.") (citations omitted); Health Mgmt. Publs. v. Warner-Lambert Co., No. 98-1557, 1998 WL 784243 (E.D. Pa. Nov. 10, 1998); Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 533 (W.D. Pa. 2000) ("that plaintiff's fraud claim, to the extent it is based upon affirmative misrepresentations, is barred by the integration clause as contrary to the express terms of the license agreement, in the same manner as the contract and warranty claims"); Sunquest Info. Sys. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 656 (W.D. Pa. 1999).[8]

After repeated review of the contract at issue here, while several sections of the APA can be interpreted to have a broad application, arguably none of these sections cover the subject matter of Interwave's and Kall's allegations with the considerable specificity of the contract

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[8] The only case cited in Interwave's and Kall's brief which actually allows parol evidence when the contract included an integration clause is Brinich v. Jencka, 757 A.2d 388, 400-01 (Pa. Super. Ct. 2000). Brinich, however, does not involve a claim of fraudulent inducement, but rather a dispute concerning damages under a oral modification to a contract where the court allowed the plaintiff's claim because, according to the court in Titelman, "the parol evidence rule does not apply if the extra-contractual representation or agreement would not 'naturally and normally' be included in the contract at issue." Titelman v. Rite Aid Corp., No. 00-2865, 2001 U.S. Dist. LEXIS 24049, at *16 (E.D. Pa. Nov. 13, 2001).

Interwave and Kall also rely on In re Estate of Hall, 535 A.2d 47, 55 (Pa. 1987), and Quorum Health Resources, Inc. v. Carbon-Schuylkill Community Hosp., Inc., 49 F. Supp. 2d 430, 432 (E.D. Pa. 1999), for the proposition that the parol evidence rule only applies to fraudulent inducement claims when the alleged misrepresentation involves a subject which is specifically dealt with in the written contract. But in Hall, the court held that the lower court's "failure to apply the parole [sic] evidence rule here was clear error." Hall at 56. Furthermore, in Quorum Health, the court held that the claims in dispute were "based on allegations of fraudulent inducement that require the introduction of pre-contractual representations. Therefore, the parol evidence rule applies to bar them."

provisions the court of appeals analyzed in Dayhoff, or that the Pennsylvania Supreme Court reviewed in HCB, or that the Pennsylvania Superior Court fastened upon in 1726 Cherry St., particularly when these allegations must be taken by the Court with all reasonable inferences in the Plaintiffs' favor. However, subsequent rational applications of Dayhoff by the lower courts have recognized the imposition of the parol evidence rule to facts similar to those here, and this Court finds persuasive the numerous opinions that interpreted Dayhoff to preclude parol evidence when the plaintiff is making a claim of fraudulent inducement and the contract at issue contains an integration clause. Contract drafting is no task to be undertaken casually, of course. However, among draftsmen even of varying skills and experience, the function and phrasing of integration clauses such as the one set forth in Section 14.11 of the APA are familiar. To require more written discourse on the subject in this contract would be to impose a belt and suspenders style of drafting that would run the risk of creating so much verbiage that the provision could become ambiguous, if not meaningless.

Fully integrated contracts preclude fraudulent inducement claims. It is no different here. Therefore, Interwave's and Kall's claim of fraudulent inducement against Rockwell as a party to the APA will be dismissed. However, as alluded to above, Interwave still has standing as a plaintiff because the remaining claims include fraudulent inducement against Ryan (Count III) who is not a party to the APA. See Sunquest Info. Sys. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 656. n.7 (W.D. Pa. 1999) (holding the integration clause bars whatever fraud in the inducement claims the plaintiff had against the defendant who was party to the contract, but not those claims against the defendant which was not a party to the contract.) The court in Sunquest distinguished two cases applying the protection of the integration clause to agents of the party to the contract. Bowman v. Meadow Ridge, Inc., 615 A.2d 755, 759 (Pa. Super. Ct.

1992) and Iwashyna v. Department of Housing and Urban Dev., No. 93-1138, 1993 WL 313702, at *14 (E.D. Pa. Aug. 16, 1993) are both distinguishable here as well, "because the integration clauses, unlike here, specifically referred to the representations of the agents as barred." Sunquest, 40 F. Supp. 2d at 656 n.7.

Therefore, Interwave's fraudulent inducement claim against Ryan will be permitted to proceed.

III. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part the Defendants' Motion to Dismiss. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/S/_____
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INTERWAVE TECHNOLOGY, INC., *et al*	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
ROCKWELL AUTOMATION, INC. and RICHARD RYAN,	:	
Defendants.	:	NO. 05-0398

O R D E R

Gene E.K. Pratter, J. December 30, 2005

AND NOW, this 29th day of December, 2005, upon consideration of the Defendants Rockwell Automation, Inc.'s and Richard Ryan's Motion to Dismiss Plaintiffs' Amended Complaint (Docket No. 18), and the responses thereto (Docket Nos. 20, 21, and 22), it is hereby ORDERED that the Motion is GRANTED in part as to Count II (Action in Deceit and Fraudulent Inducement against Rockwell) and DENIED in part as to Counts I, III, and IV. Defendants shall file their answer within twenty (20) days of the date of this Order.

Concerning the schedule for this case, IT IS FURTHER ORDERED:

A. Discovery

1. Parties shall provide their Initial Disclosures pursuant to Rule 26(a) of the Federal Rules of Civil Procedure within thirty days of the date of this order.

2. Fact discovery (including interrogatories, document requests, requests to admit and depositions) shall be completed by June 16, 2006.

3. On or before May 12, 2006 the parties shall identify subject matters for expert testimony. On or before July 14, 2006, the party who will ultimately bear the burden of proof on any particular issue shall disclose the identity of each person

whom they expect to call as an expert witness to testify at trial as to that issue and produce reports signed by such expert(s), which reports shall contain the facts and opinions to which the expert will testify, a current curriculum vitae, and a list of material consulted and/or relied upon in connection with the preparation of the expert's report. On or before August 11, 2006, the Parties shall disclose the identity of each person whom they expect to call as rebuttal expert at trial, produce report(s) signed by such rebuttal expert(s), which reports shall contain the facts and rebuttal opinions to which the rebuttal expert will testify, a current curriculum vitae, and material consulted and/or relied upon in connection with the preparation of the rebuttal expert's report. Expert witness discovery shall be completed by September 15, 2006.

B. Dispositive Motions

Any motions for summary judgment shall be filed on or before October 13, 2006. Any such motions, and any opposition thereto, shall comply with this Court's policies and procedures regarding the form of such motions.

C. Protective Order

The Parties will stipulate to a separate Protective Order(s) to address protection of confidential and privileged information. Inadvertent production of material claimed to be privileged shall be addressed in the manner agreed upon by the Parties in the proposed Joint Case Management Order submitted to the Court by letter dated November 29, 2005 (Docket No. 32).

D. Pretrial Conferences

The Court will schedule such pretrial status conferences as may be necessary at which time a schedule for trial and final pre-trial matters will be discussed. The Parties are advised that they should consider it likely that the Court will set this case for trial no later than December 2006.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE